

MEMORANDUM

TO: MAYOR AND CITY COMMISSION

FROM: CITY ATTORNEY'S OFFICE

DATE: October 21, 2019

RE: **Fifth Amendment to Solid Fuel Transportation Agreement for Coal Shipment with CSX Transportation, Inc.**

Attached hereto for your consideration is a proposed Fifth Amendment to the City's Solid Fuel Rail Transportation Agreement (Agreement) with CSX Transportation, Inc. (CSX) for the shipment of coal requirements for Lakeland Electric's McIntosh Unit #3. The City's existing Agreement, approved by the City Commission in October 2014, will expire on December 31, 2019. In anticipation of the Agreement's expiration, Lakeland Electric staff spent several months negotiating with CSX in an effort to secure competitive rates by extending the contract term as well as revising and clarifying specified terms set forth in the Agreement.

While no minimum coal tonnage requirements are contained in the Agreement, the ceiling to transport coal is 1 million tons annually. The Agreement contains a \$650,000 per month capacity charge and a variable cost component to competitively dispatch coal units in the Florida Municipal Power Pool. The variable transportation rates contained in the Agreement range from \$19.00 to \$23.30 per ton. Given the capacity payment charge, the Agreement does not contain a liquidated damages provision which would require the City to pay CSX for its inability to meet tonnage requirements.

Pursuant to this Fifth Amendment, both the capacity charge and variable rates will remain firm from October 1, 2019 through December 31, 2020. Commencing January 1, 2021 to December 31, 2023, the capacity charge and variable rates will be subject to an estimated quarterly change based on the Rail Cost Adjustment Factor which is an industry standard that measures the rate of inflation in railroad inputs such as labor and fuel.

This Fifth Amendment contains a capacity charge adjustment in the event CSX is unable to deliver the required tonnage needed by the City. The variable origin rates are the costs used on the actual tonnage received. The Fifth Amendment also provides for a suspended capacity charge during any force majeure event that lasts over thirty (30) days. Also incorporated in this Fifth Amendment is an indemnity provision requiring CSX to indemnify the City for any liability arising out of CSX's negligence or intentional wrongful misconduct in the performance of its contractual obligations.

The term of this Fifth Amendment shall have a retroactive effective date of October 1, 2019, subject to approval by the City Commission, and continue through December 31, 2023. In addition, the Fifth Amendment includes an early Termination clause upon sixty (60) days prior written notice should the City Commission elect to decommission Unit #3 prior to December 31, 2023.

Lakeland Electric anticipates that it will need a total of 2,990,500 tons of coal during the term of the Fifth Amendment. The combined cost for this term is estimated at \$94,901,078. Lakeland estimates the average cost per ton will range between \$31.73 to \$35.78 during the contract term. The average cost per ton over the last four (4) year period of the Agreement was \$39.63. Except as otherwise provided in this Fifth Amendment all other terms/conditions shall remain in full force and effect.

It is recommended that the City Commission approve this Fifth Amendment to the Solid Fuel Transportation Agreement for Coal Shipment with CSX and authorize the appropriate City officials to execute the Fifth Amendment in accordance with the above-specified terms/conditions.

attachment

**AMENDMENT NUMBER 5
TO SOLID FUEL TRANSPORTATION CONTRACT
CSXT-C-85933**

This Amendment Number 5 (this "Fifth Amendment") to the Solid Fuel Transportation Contract CSXT-C-85933, dated as of October 1, 2014 (the "Contract"), is entered into pursuant to 49 U.S.C. Section 10709, as of the 21st day of October 2019, by and between the CITY OF LAKELAND, FLORIDA, a municipal corporation, whose address is 501 East Lemon St. Lakeland, Florida 33801 (hereinafter referred to as "Receiver"), and CSX TRANSPORTATION, INC. ("CSXT"), a Virginia corporation whose address is 500 Water Street, Jacksonville, FL 32202 (hereinafter, together with participating carriers, referred to individually or collectively, as "Carrier"). Capitalized terms used herein but not defined herein shall have the meaning ascribed to them in the Contract.

RECITALS

The parties to this Fifth Amendment desire to amend the Contract to extend the Term and revise the rates and the other terms and conditions as specifically set forth below.

AGREEMENT

For and in consideration of mutual covenants, provisions, benefits and agreements hereinafter made and contained and other good and valuable considerations flowing between the parties hereto, Carrier and Receiver do hereby covenant and agree as follows:

ARTICLE I

DEFINITIONS

1.1. Certain Definitions. The following terms when used in this Fifth Amendment shall have the following meaning:

“Fifth Amendment” shall mean this Fifth Amendment, together with Exhibit A hereto.

ARTICLE II

TERM and TERMINATION

2.1. Term. Article II, Section 2.1 of the Contract is hereby amended as follows: This Contract shall be effective as of October 1, 2014 (“the Effective Date”) and will continue in full force and effect through December 31, 2023, unless terminated as provided herein.

2.2 Termination. Article II is hereby amended to add Section 2.2 entitled “Termination” and shall include the following provision:

In the event Receiver’s duly authorized elected body, the City of Lakeland City Commission, votes to decommission its coal plant and permanently discontinue its operations, Receiver reserves the right to terminate this Contract. Receiver shall provide Carrier with its written notice of its intent to terminate this Contract upon no less than sixty (60) days of such event.

ARTICLE III

CONDITIONS TO EFFECTIVENESS

3.1. Fifth Amendment Effective Date. This Fifth Amendment (and the amendments and modifications contained herein) shall become effective as of October 1, 2019 (hereinafter “Fifth Amendment Effective Date”), when each of the conditions set forth in this Article III shall have been fulfilled to the reasonable satisfaction of Carrier and Receiver.

3.2. Execution of Counterparts. Each party shall have received an executed (manual or electronic) counterpart of this Fifth Amendment, duly executed and delivered on behalf of an Authorized Officer of the other party.

3.3. Nominations. Receiver shall have provided Carrier with a non-binding forecast

of any Tons it intends to tender from the Origins during the sixty (60) day period following the Fifth Amendment Effective Date.

3.4. Satisfactory Legal Form. All documents executed or submitted pursuant hereto shall be satisfactory in form and substance to each of the parties.

3.5. Estimation of Annual Volumes. Section 3.1 is hereby amended in its entirety as follows: On or before October 1st of each year, Receiver shall provide CSXT with a non-binding annual forecast of Solid Fuel that the Receiver expects to be transported by CSXT in the following calendar year, by Origin or Origin Rate District.

3.6. Nomination of Quarterly Volumes. Section 3.2 is hereby amended in its entirety as follows: Receiver shall nominate quarterly shipments (each a "Quarterly Nomination") at least thirty (30) days prior to each calendar quarter.

ARTICLE IV

OTHER CHANGES

4.2. Capacity Charge. The second sentence of Section 4.1 is hereby amended to change the Capacity Charge for January of 2020 to be determined in Appendix A. The Capacity Charge will be adjusted pursuant to the other provisions of Article IV during the term.

4.3 Revised Rates. Effective on, and subject to the occurrence of, the Fifth Amendment Effective Date, Appendix A to the Contract will be amended and restated in its entirety as set forth in Exhibit A to this Fifth Amendment.

4.4 Indemnity. A new Section 18.4, entitled "Indemnity", is hereby added to the Contract effective October 1, 2019:

18.4 Indemnity: CSXT shall defend, indemnify, and hold harmless Receiver,

its officers, directors, agents, guests, invitees, and employees from and against all liabilities, damages, losses, and costs (including but not limited to reasonable fees and charges of attorneys, and other professionals and court and arbitration costs) to the extent arising from or resulting from any acts of negligence, gross negligence or intentional wrongful misconduct in the performance of CSXT's obligations under the Contract.

The parties agree that to the extent the written terms of this provision conflict with any provision of Florida law or statute, the written terms of this provision shall be deemed by any court of competent jurisdiction to be modified in such a manner as to be in full and complete compliance with all such laws or statutes and to contain such limiting conditions or limitations of liability, or to not contain any unenforceable or prohibited term or terms, such that this Indemnification provision shall be enforceable in accordance with and to the extent permitted by Florida law.

4.5. Force Majeure. A new sentence is added to Section 20.1 which states: In the event of a Force Majeure extending over thirty (30) days, the monthly capacity charge will be suspended during the remainder of the Force Majeure event.

ARTICLE V

COUNTERPARTS

This Contract shall be executed in two (2) counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one and the same instrument.

ARTICLE VI

ENTIRE UNDERSTANDING

The Contract, as amended by this Fifth Amendment, represents the entire understanding of the Parties and may not be modified without their written consent. This

Fifth Amendment shall be construed (except to matters referring to federal laws or regulations) according to the laws of the State of Florida and has been executed by the duly authorized representatives of the Parties.

ARTICLE VII

APPLICABLE LAW

To the extent not governed by applicable federal statute or regulation, the laws of the State of Florida shall govern the validity, construction and performance of this Fifth Amendment and all controversies and claims arising thereunder without regard to its conflicts of law provisions.

ARTICLE VIII

CONFLICTING TERMS; NO OTHER CHANGES

Except as expressly set forth in this Fifth Amendment, nothing in this Fifth Amendment shall be interpreted to alter, modify or amend any of the terms, conditions and agreements contained in the Contract and Amendment Numbers 1, 2, 3 and 4.

IN WITNESS WHEREOF, the parties have caused this Contract to be duly executed as of the day and year first written above.

CITY OF LAKELAND, FLORIDA

CSX TRANSPORTATION, INC.

By: _____
H. William Mutz
Its: Mayor

By: _____
Its:

WITNESS:

By: _____

Attest:

By: _____
Kelly S. Koos, City Clerk

Approved as to form and correctness:

By: _____
Office of the City Attorney

Appendix A	
Rates Valid	10/1/2019 - 12/31/2020
Rate Per Ton - Evansville, IN Rule 11	\$19.00
Rate Per Ton - Terre Haute, IN	\$22.00
Rate Per Ton - Carlisle, IN	\$22.00
Rate Per Ton - Oaktown, IN	\$21.00
Rate Per Ton - White Oak, IN (EVWR via Evansville)	\$22.50
Rate Per Ton - Gibcoal, IN	\$21.00
Rate Per Ton - Corbin Gateway	\$19.30
Rate Per Ton - Russel Gateway	\$20.80
Rate Per Ton - Hinton Gateway	\$21.00
Rate & Fixed Payment Adjustment	Quarterly RCAFU beginning 1/1/2021
Minimum Annual Volume	None
Monthly Fixed Payment	\$650,000
Max Annual Volume (Tons)	1M
Liquidated Damages	None
Fuel Surcharge	None
Railcar Supply	Receiver owned or leased equipment
Minimum Train Size	110